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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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Issued by the Department of Transportation
on the 3rd day of October, 1996

INTERNATIONAL AIR TRANSPORT ASSOCIATION:

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-95-232 – 36

AIR TRANSPORT ASSOCIATION OF AMERICA:

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-96-1607 – 7

ORDER TO SHOW CAUSE

Summary:

By this order we tentatively approve three agreements between US and foreign air carriers waiving the passenger liability limits of the Warsaw Convention for death or injury in international accidents, and waiving the carrier defense of proof of non negligence under Article 20(1) of the Convention up to 100,000 SDRs (approximately $145,000[1]), subject to conditions, and subject to certificate and permit conditions to be adopted. We propose to condition the agreements to require application on a systemwide basis and that the agreements be applied with regard to carriers participating in interline operations to and from the United States, and to exclude the application of certain options on flights to and from the United States. We also propose to adopt certificate and permit conditions to make participation in the two IATA Agreements, as well as the

[1] Based on the value of the SDR, September 3, 1996.

18 pgs.

form of the Agreement proposed by ATA (the Provisions Implementing the IATA Intercarrier Agreement (IPA)) mandatory for all US and foreign air carriers operating to and from the United States, to make applicable to the United States the most favorable provisions for passengers that are applied by any carrier in any other jurisdiction, and to require that US carriers agree to submit to the courts of the domicile or permanent residence of the passenger (a fifth jurisdiction). We request comments on alternative measures for the protection of US citizens in circumstances where the fifth jurisdiction might otherwise not be applied.

The Applications:

By applications filed July 31, 1996, the International Air Transport Association (IATA), and the Air Transport Association of America (ATA), request approval of, and grant of antitrust immunity with respect to, three agreements. These agreements, in increasing details of implementation, provide for waiver in their entirety, by carriers parties to those agreements, of the limits of liability applicable under the Warsaw Convention[2] to passengers killed or injured in international aircraft accidents.[3] The IATA and ATA Agreements are proposed for application worldwide. The Agreements were negotiated by carriers under discussion authority granted to IATA and ATA by DOT Orders setting forth guidelines for such Agreements.[4]

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, with additional Protocol, concluded at Warsaw, October 12, 1929, entered into force for the United States, October 29, 1934, 49 Stat. 3000; TS 876; 2 Bevans 983; 137 LNTS 11. In principal effect the Warsaw Convention limits the liability of carriers for passengers killed or injured in international aircraft accidents to $10,000. Under a 1966 intercarrier agreement, carriers operating to and from the United States waived that limit up to $75,000 for journeys to and from the United States, and waived the defense, under Article 20(1) of the Convention, of carrier proof of non-negligence. Pursuant to 14 CFR 203 all carriers operating to and from the United States are required to be, and are deemed to be, parties to the 1966 agreement. Thus the applicable limit to and from the United States is currently $75,000.

[3] IATA and ATA, respectively, also request an exemption from various regulations and orders, *etc.* of the Department that require adherence to the 1966 intercarrier agreement waiving the Warsaw limits to $75,000 to and from the United States, and that the instant agreements may be substituted for the 1966 intercarrier agreement in those regulations and orders, *etc.*

[4] Discussion authority was granted to IATA, ATA, and participating carriers, upon the request of IATA, by Order 95-2-44, and extended by Orders 95-7-15, 96-1-25, and 96-3-46. Discussion authority was granted

The Agreements:

The IATA Intercarrier Agreement (IIA) is an umbrella agreement unanimously endorsed at the IATA annual general meeting on October 31, 1995. At the time of filing, it had been signed by 65 US and foreign carriers, representing over 50% of the world's air traffic in 1995. In principal substantive effect, the IIA provides that the carriers agree:

> "1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable damages may be determined and awarded by reference to the law of the domicile of the passenger."

Accordingly, the liability limits of the Warsaw Convention are waived in their entirety on a systemwide basis. The IIA agreement also reserves available defenses, but provides nevertheless, that "any carrier may waive any defense, including the waiver of any defense up to a specified monetary amount of recoverable compensatory damages, as circumstances may permit. It further preserves carriers' rights of recourse against any other person; provides that the carriers will encourage other airlines involved in the carriage of passengers to apply the terms of the IIA agreement to such carriage; and provides for implementation no later than 1 November 1996 or upon receipt of requisite government approvals.

The Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) includes specific language for tariffs or conditions of carriage, and makes provision for other optional waiver provisions. The mandatory provisions include the waiver of the limits, and a waiver of the carrier defense under Article 20(1) of the carrier proof of non-negligence, up to 100,000 SDRs (approximately $145,000), as follows:

> "1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any

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to ATA, IATA and participating carriers, upon the request of ATA, by Order 95-12-14.

claim for recoverable compensatory damages arising under Article 17 of the Convention.

"2. {CARRIER} shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs [unless option II(2) is used]."[5]

All defenses, other than the Article 22(1) carrier proof of non-negligence up to 100,000 SDRs, are preserved, as well as all rights of recourse against any other person.

The IMA provides an option that "recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger, and that the waiver of the limit and the defenses shall not be applicable to "claims made by public social insurance or similar bodies".[6] Also provision is made to include, at the option of a carrier, additional provisions not inconsistent with the Agreement, which are in accordance with applicable law.

The ATA Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs (IPA) includes specific provisions, consistent with, but more specific and inclusive than the IATA, IIA and MIA Agreements. Thus the IPA Agreement provides that carriers shall, on a systemwide basis:

1. Not invoke the limitation of liability in Article 22(1) of the Convention.

2. Not avail itself of the Article 20(1) defense of carrier proof on non-negligence up to 100,000 SDRs.

3. Reserve other defenses, and the right of recourse, contribution and indemnity with respect to third parties.

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[5] Option II(2) permits a carrier to provide for waiver of the Article 20(1) carrier defense of proof of non-negligence to amounts of less than 100,000 SDRs on specific routes. However, waivers for less than 100,000 SDRs must be authorized by the governments concerned with the transportation. It was understood by IATA that such waivers for less than 100,000 SDRs would not be permitted to and from the United States, and, as detailed within, we will not authorize such waivers.

[6] IATA notes that the provision withholding the waivers for public social insurance or similar bodies is not intended to apply to the United States, and we will not approve it for application to the United States.

4. Agrees that subject to applicable law recoverable compensatory damages may be determined by reference to the law of the domicile or permanent residence of the passenger.[7]

The ATA IPA Agreement also includes a specific notice provision; a provision for withdrawal from the 1966 agreement and substitution of the IPA Agreement for the 1966 intercarrier agreement, in all DOT regulations and orders, *etc.*, referring to the 1966 agreement; and a permissive provision to encourage other carriers to become parties to the IIA, MIA and IPA Agreements.

Comments of the Parties:

Comments in support of the IATA and ATA Applications were filed by the Association of Trial Lawyers of America (ATLA), the Aerospace Industries Association (AIA); the International Chamber of Commerce (ICC), and the Victims Families' Associations (KAL 007; PAA 103; TWA 800).[8] The Victims Families requested that DOT's approval be subject to conditions with respect to strict liability or the fifth jurisdiction permitting certain actions to be brought in the United States. A comment was also filed by an individual, Sven Brise, Consultant, urging consideration of an alternative plan, in lieu of the agreements filed by IATA and ATA.

In support of its application for approval, IATA argues that the IIA/MIA will eliminate the limitation of liability as a barrier to the award of all otherwise recoverable compensatory damages, and will put an end to the wasteful and costly "wilful misconduct" litigation in the United States which has been necessary to avoid the previously applicable $75,000 limit. Moreover, it will also provide strict liability up to 100,000 SDRs. Further, the agreements will apply throughout the international air transportation system, regardless of the passengers' nationality or venue in which claims are adjudicated, and will be financed through the carriers insurance, a far less costly means than the previously considered complex

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[7] Under this provision the carrier agrees that the law of the domicile may be applied. It does not, however, attempt to bind the claimant to this choice of law. ATA Application, 1st. par., p. 8.

[8] The Victims Families Associations request leave to late file. We will grant the motion.

supplemental compensation plans. Moreover, as the Department has previously recognized, important United States foreign policy and international comity interests will be advanced by approving and granting anti-trust immunity for the IIA and MIA in that it will facilitate the global enhancement of passenger rights while preserving the benefits otherwise available under the Warsaw Convention. Antitrust immunity is required to allay carrier concerns that standardization of the passenger-carrier contract could raise issues under the U.S. antitrust laws. To the extent that these Agreements do not fully meet the guidelines in Order 92-12-43, there is no inconsistency between approval of the IIA/MIA Agreements and the continuing pursuit of broader Warsaw Convention reform by the United States at a governmental level.

ATA argues that its IPA Agreement represents a comprehensive, uniform implementation of the IATA IIA/MIA agreements, and that approval and grant of antitrust immunity is in the public interest since it would preserve the Convention's liberal uniform liability rules, including the presumption of fault on the part of carriers. Pursuant to the waiver of the Warsaw limits, approval will result in the measure of damages for death or injury in international air accidents being consistent with those available in cases arising in U.S. domestic air transportation, wherever the forum, so that international passengers will be assured of prompt and fair compensation for losses without burdensome litigation. This would be consistent with US foreign policy goals in that it would preserve the Warsaw regime and avoid unnecessary conflicts with US aviation partners. Since the agreements remove the Warsaw liability limits, further reforms should be sought with the cooperation of other Governments to avoid jeopardizing this remarkable achievement. The IPA Agreement will address the serious transportation need of assuring international passengers prompt and fair compensation, with the important benefit of providing such compensation in a timely manner without needless litigation. The agreement is consistent with the US foreign policy goals of a broad uniform international passenger liability regime, of worldwide applicability (under the IIA and MIA with which it is consistent), and avoiding conflicts with our aviation partners. There is no reasonable alternative, since the Convention amendment approach has proved to be impossible to achieve on a timely basis. Antitrust immunity is required to avoid the risk of antitrust challenge and liability, and the agreement will not be implemented without it. The IPA special contract will terminate the participating carriers' participation in the 1966 intercarrier agreement upon implementation, and the

Department's approval will substitute the IPA Agreement for the 1966 Agreement in all Department regulations, orders, and certificate/permit, etc. conditions that require adherence to the 1966 Agreement.

ATLA considers that, on balance, the IATA Agreements will vastly improve the passenger liability standards in international transportation and, therefore, it strongly urges immediate approval. The Agreements will avoid the necessity of international passengers having to prove willful misconduct in order to recover full and fair compensatory damages. ATLA does express concern that the Agreements will not provide for a fifth jurisdiction based on the passengers' domicile. While ATLA would have preferred that the United States withdraw from the Warsaw Convention entirely, it views these Agreements as a substantial step forward.

AIA similarly urges prompt approval, since the existing Warsaw regime unreasonably restricts the rights of recovery of international passengers and is inequitable in its impact on third parties. Under the IIA/MIA/IPA Agreements, international passengers will have the benefit of a liability system better than that available to domestic US passengers, since the carrier will retain the burden of proving non-negligence, and strict liability will be applicable up to 100,000 SDRs. These beneficial results are achieved without imposing a surcharge on tickets or creating an administratively complex supplemental-compensation scheme.

The ICC urges the department to swiftly approve and immunize the IIA/MIA/and IPA Agreements. The agreements remove the limits under the Warsaw Convention without destroying the global uniformity that has long been the hallmark of the Warsaw framework, leaving, in the vast majority of cases, only the issue of the measure of damages, and thereby providing for the prompt settlement of claims. The ICC also notes that its International Court of Arbitration has been working with IATA to create an arbitration mechanism for the expeditious determination of damages at a location to be selected in a manner acceptable to the claimant.

The Victims Families agree that DOT approval of an intercarrier agreement is an appropriate means to remove the liability limits of the Warsaw Convention, and applaud IATA and ATA for developing such Agreements. They nevertheless urge, particularly with respect to the IIA and MIA agreements, that further modifications are required. They therefore urge that DOT attach conditions for operations to

and from the United States that would provide further mandatory protections to insure prompt and complete liability with no per passenger limits and extension of coverage to all U.S. citizens and permanent residents regardless of the place of purchase of the passenger ticket. Specifically, they urge that that the limits must be waived in their entirety; that the ATA provision on the permissive application of domiciliary law be required to and from the U.S. and be optional with the claimant; that the waiver of the Article 20(1) defense should not be limited in amount, or should be at a level higher than 100,000 SDRs (250,000 SDRs) with an escalation provision; and that carrier agreement to submit to a fifth jurisdiction based on the domicile of the passenger should be required for all carriers operating to and from the U.S. so that recoveries could be sought in U.S. courts, regardless of where the ticket is purchased.

Sven Brise, Consultant, argues that an alternative program should be adopted, pending ICAO legislative processes to achieve a more acceptable solution. He suggests a fixed worldwide limit of 500,000 SDRs (approximately $725,000). He recognizes, nevertheless, that such a proposal would be unacceptable to the United States. He suggests, therefore, that US carriers only, could be subjected to a different, presumably unlimited regime, with other foreign carriers subject to a passenger option plan under a surcharge.[9]

Decision:

We tentatively find that the agreements should be approved, subject to conditions. With their provision for the worldwide waiver of the Warsaw passenger liability limits, the agreements have made a gigantic step toward creating an international liability regime under which carriers properly accept liability for death or injuries of passengers utilizing their services. No longer must passengers suffer decades of litigation in efforts to establish the "wilful

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[9] As Mr. Brise recognizes, his proposal would be unacceptable to the United States. It is unacceptable because it retains a limit for which there is no longer any justification in international aviation, it does not promote uniformity, and it retains the costly double insured supplemental plan, which nevertheless would not be universally applicable, even to and from the United States. As Mr. Brise has noted, his plan has been previously proposed and has not been accepted by the international community. It is not before us in the form of any intercarrier agreement. Accordingly, and in view of our tentative decision to approve, subject to conditions, those agreements that are before us, we will not give the plan any further consideration.

misconduct" which was required under the Warsaw Convention for passengers to recover reasonable damages. Moreover, by providing for coverage of this liability under the carriers' liability insurance, the costly double coverage of the previously considered supplemental compensation plan will be avoided. Clearly, therefore, the agreements are not adverse to the public interest.

We do consider, nevertheless, that the public interest requires that various conditions be attached to our approval. These arise principally from the optional nature of several of the IATA MIA Agreement provisions, and the lack of specification for implementation in the IATA IIA Agreement.

As we stated in Order 95-12-14:

> "If incessant litigation is to be avoided, and passengers are to be granted full recoveries under a simplified liability regime, in accordance with the objective of the IIA, it will be necessary to ensure that a single liability regime which adequately meets the Department's Guidelines be in effect for all passengers on flights to and from the United States, and hopefully for most flights throughout the world."

The MIA, which was designed to provide uniformity in implementation of the IIA, fails to meet this requirement, in that many of its provisions are made optional, including the provision for application of the law of the domicile of the passenger which we had thought had been a feature of the IIA. Accordingly, we tentatively propose to condition our approval to specify those options which must be applied for operations to and from the United States, including interline operations. Generally, but not completely, these conditions are satisfied by the IPA Agreement submitted by ATA. For carriers operating to and from the United States, we will further require that the waiver of the Warsaw liability limit, in its entirety, must be applied on a systemwide basis as contemplated in the Agreements. As detailed below, we tentatively propose to attach other conditions to the certificates, permits and other authority of US and foreign carriers operating to and from the United States.

The conditions which we tentatively propose to attach to our approval of the IIA, MIA, and IPA include the following:

a. The optional application of the law of the domicile provision would be made mandatory for operations to,

from, or with a connection or stopping place in the United States.[10]

b. The agreement's optional provision for less than 100,000 SDR's strict liability on particular routes, could not apply for any operations (including interline operations) to, from, or with connections or an agreed stopping place in the United States.

c. The provision for waiver of the Warsaw passenger liability limit, in its entirety, would be applicable on a systemwide basis.

d. For transportation to and from the U.S., the provisions of the agreement would apply with respect to any passengers purchasing a ticket on an airline party to the agreements, including interline travel on carriers not party to the agreements. The carrier ticketing the passenger, or, if that carriers is not a party to the Agreements, the carrier operating to or from the United States, would have the obligation either to ensure that all interlining carriers were parties to the Agreements, as conditioned, or to itself assume liability for the entire journey. (See Warsaw Article 30(1) and (2))

e. The inapplicability for social agencies of the waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies.

We also tentatively propose to amend all US air carrier certificates, all foreign air carrier permits, and any other outstanding authority to operate to or from the United States, to universally apply the Agreements as conditioned to all direct carriers operating to, from or within the United States. Mandatory participation of all carriers operating to and from the United States has been in effect since the 1966 waiver agreement; all parties were fully aware that it was the United States' intention to require such participation, and the public interest clearly requires

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[10] Paragraph I(4) of the ATA IPA Agreement, as we interpret it, would meet this requirement. We note that the requirement is that the carrier must agree, at the claimant's option, to application of the law of the domicile or permanent residence of the passenger. We do not, however, intend to direct courts as to which law must be applied, if despite the carrier's agreement and submission, the court should determine that a different law must be applied.

such mandatory participation for the reasonable protection of passengers of airlines operating in international air transportation to and from the United States.[11]

We further tentatively propose to condition all US air carrier certificates, all foreign air carrier permits, and all other operating authority, to require that all tariffs, contracts of carriage or other similar provisions applied by any carrier, in any jurisdiction, to the extent any such provision would be more favorable to its passengers with respect to recoveries for passenger deaths and injuries under the Warsaw Convention system than the provisions of the IATA and ATA Agreements, as conditioned by the Department's approval order, shall apply equally to all passengers on services to and from the United States. To the extent that the carrier has agreed, whether pursuant to Governmental regulation or otherwise, to liability provisions favorable to passengers, albeit limited to certain jurisdictions, or certain classes of passengers, the failure to extend the same benefits to US citizen or permanent resident passengers, or other passengers traveling in international air transportation, would constitute unjustifiable and unreasonable discrimination prohibited by 49 U.S.C. sec. 41310, and could not be accepted for operations to and from the United States. Accordingly, the carrier would be required by this condition on its operating authority to extend those benefits to all passengers traveling in international air transportation.[12]

We agree with ATA that the Agreements as conditioned will serve as full compliance with the regulations and orders

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[11] Our reference in this order to "international air transportation" refers in this order to "international transportation" (to and from the United States) as defined in the Warsaw Convention. Thus we include interstate operations of an air carrier which carries a passenger on the domestic segment of an international journey. See Warsaw Convention, Article 1(2)(3).

[12] Thus, for example, this condition would require EU carriers, assuming that EU regulations are adopted in their present proposed form, to apply for the benefit of passengers traveling in international air transportation to and from the United States, the provision in Article 4 of the proposed EU Regulations that requires an immediate and unrecoverable payment of 50,000 SDRs for passengers killed or injured in aircraft accidents. It would also require that EU carriers, or any other carrier applying that provision, agree to submit to the jurisdiction of the courts of the passengers' domicile or permanent residence, including and particularly passengers domiciled or permanently residing in the U.S., in accordance with Article 7 of the proposed EU regulations, notwithstanding that the EU regulation is in terms limited to submission to the jurisdiction of courts of an EU Member State.

requiring participation in the 1966 intercarrier Agreement waiving the Warsaw liability limits to $75.000 (Agreement 18900). Our acceptance of such compliance will obviate the need for the exemptions from such regulations and orders, as requested by IATA.[13]

We are seriously concerned with the agreements' failure to meet the Department's guidelines in two important respects.[14] First, the agreements provide for strict liability only for damages up to 100,000 SDRs (approximately $145,000). As pointed out by the Victims Families, if an action is brought in the United States under U.S. law, the question of strict liability may take on less importance. This is because it would be a very rare case where an airline could sustain the Warsaw burden of proving that it was not guilty of negligence in some form.[15] However, while the outcome may be predictable, the failure to provide for strict liability will inevitably result in unnecessary and expensive litigation, with both the claimants and the airline bearing the burden of an inefficient liability system. Moreover, as the Victims Families point out, the issue is much more significant in cases where jurisdiction does not lie with U.S. courts.

Nevertheless, and based on our proposals to provide protection for U.S. citizens under circumstances where the Warsaw Convention would not provide for jurisdiction in U.S. courts, we have decided to accept the 100,000 SDR limitation on strict liability. We do this in the interest of establishing a single, worldwide, liability standard. The 100,000 SDR limitation on strict liability has found wide

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[13] This assumes that the carrier is a Party to the ATA IPA agreement, including the Notice provision contained in that Agreement.

[14] The guidelines were set forth in Order 95-2-44, initially approving the IATA request for discussion authority, and incorporated by reference in all subsequent discussion authority orders. The guidelines read:

> "First, with regard to passenger claims arising from international journeys ticketed in the United States, passengers would be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits and with measures of damages consistent with those available in cases arising in U.S. domestic air transportation; second, this coverage should be extended to U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States."

[15] Thus, in the KAL 007 and PAA 103 disasters which were the result foreign government and terrorist shootdown and bombing, not only was negligence found, but the plaintiffs established "wilful misconduct", an extreme form of gross negligence, on the part of the airline. However, in the KAL case, this was only after more than a decade of litigation.

acceptance in the carrier discussions, and apparently also has the support of the European Union in its proposed regulations. Accordingly, subject to adequate protection for U.S. citizens and permanent residents, we find that foreign policy and comity reasons justify our acceptance of a narrow departure from our guidelines to the extent that strict liability is limited to 100,000 SDRs.

Our guidelines also provide that U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States should be subject to a measure of damages consistent with those available in cases arising in U.S. domestic air transportation. This can be accomplished only if claimants on behalf of U.S. citizen or permanent resident passengers have access to U.S. courts. Even with the limits waived in their entirety, such claimants can anticipate full and fair recoveries only if the standard of damages is assessed by U.S. courts. Even where the law of the domicile of the passenger is applied, if that application is by a court in which recoveries do not approach those normally granted by U.S. courts, a claimant could not anticipate a full and fair recovery of damages.

U.S. carriers had proposed, therefore, that the carriers agree to submit to the jurisdiction of the courts of the domicile or permanent residence of the passenger. This proposal was vigorously opposed, however, by a couple of large European carriers. As a result, there was no consensus for including this fifth jurisdiction.[16] This despite the fact that the 1971/75 Guatemala/Montreal Protocols included such a fifth jurisdiction, and the inclusion of such a fifth jurisdiction is also a provision of the proposed regulations of the European Union.

We are disappointed at the absence of a consensus for carrier submission to the fifth jurisdiction. Since the IATA Agreements are contemplated to have worldwide application, and would be widely adhered to, inclusion of the fifth jurisdiction would have gone a long way toward meeting the Department's guidelines to the extent that

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[16] Article 28 of the Warsaw Convention limits the jurisdiction in which claims may be brought to the domicile or principle place of business of the carrier, the place where the ticket was purchased, and the place of destination. Thus for a trip originating in the United States, where the ticket was purchased elsewhere, a U.S. citizen or permanent resident traveling on a foreign carrier would be denied access to U.S. courts. Similarly, a U.S. citizen or permanent resident on a trip between two foreign points, or on a round trip from a foreign point, or even on a side journey on a trip originating in the United States, might be denied access to U.S. Courts.

protection of U.S. citizens and permanent residents would apply wherever the ticket was purchased, or wherever the flight took place. Thus, we are very sympathetic to the request of the Victims Families that a condition be included to require carriers to submit to the fifth jurisdiction, and the concern expressed by ATLA as to the same matter. Since the objections do not apply with respect to U.S. carriers, we propose to include a condition to require that U.S. carriers submit to the fifth jurisdiction based on the domicile or permanent residence of the passenger.[17]

Nevertheless, a fifth jurisdiction may not be the only way to provide adequate protection for U.S. citizens. Therefore, in view of the adamant opposition with respect to foreign carriers, we will consider other alternatives. In this respect we request comments on certificate or permit conditions which would require one or more of the alternatives set forth below, or others, which might provide adequate protection for U.S. citizens and permanent residents traveling under circumstances where Article 28 of the Warsaw Convention did not provide for jurisdiction in U.S. courts.

Among alternatives, one or more of which might provide adequate protection, are the following:

a. Carriers operating to and from the United States, including any carrier interlining for any passengers traveling to and from the United States, would be required to offer passengers an alternative of arbitration in the event a U.S. citizen passenger (or preferably any passenger) could not, by reason of the jurisdiction limitations in Article 28 of the Warsaw Convention, seek recoveries in the courts of his/her domicile or permanent residence. Such arbitration procedures would have to be subject to DOT approval; would be at the expense of the carrier; would apply only to damages (strict liability would apply for the full amount of the recovery)[18]; would require that the passenger could select among some panel of arbitrators

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[17] We recognize that U.S. carriers have their domicile and principal place of business in the United States, so that jurisdiction under Article 28 of the Convention would always exist in U.S. courts. However, the condition will require that U.S. carriers submit to the jurisdiction of foreign courts, in the case of a foreign domiciled passenger.

[18] We do not consider that arbitration would be appropriate for consideration of an issue concerning a carrier's defense of proof of non-negligence.

having the citizenship of his/her permanent residence; the carriers would have to be totally insulated from the selection of arbitrators on the panel; and the arbitration proceedings would have to be held within the territory of the passenger's domicile or permanent residence, and at a convenient place for the passenger. Procedures of the American Arbitration Association might, for example, be appropriate as an already existing, inexpensive, and effective, arbitration system.

b. Foreign carriers not adhering to the fifth jurisdiction would be required to expressly and clearly inform passengers at the time of purchase of any ticket to/from the U.S., and to include a specific notice (clearly readable--*i.e.*, in bold face, large, contrasting color type) informing passengers that the Convention might prohibit an action for damages in their domicile or permanent residence, since (unlike other carriers) the carrier had not submitted to the jurisdiction of the courts of the passenger's domicile or permanent residence. (*See*, Proposed EU Council Regulation, Article 5(3)) (We would consider this alternative as an addition to, not in lieu of, other alternatives.)

c. All carriers (or perhaps only those not adopting the fifth jurisdiction) on a journey from the United States, would be required to obtain (at their expense) an accident insurance policy in a relatively large amount (*e.g.*, 500,000 SDR's) which would be payable to a passenger killed, or seriously injured (*e.g.*, medical expenses equivalent to 10% of that amount), without regard to the airline's liability, and valid for a period of one-year (six-months) for any flight, anywhere in the world (to pick up side trips and U.S. citizens stationed abroad). The amount payable by the insurance could be offset against any recovery under the Warsaw Convention, but would not be refundable, regardless of liability. (*See*, Proposed EU Council Regulation, Article 4) (We would anticipate that the costs of such accident insurance protection, when secured in conjunction with a carrier's liability insurance, would be relatively nominal.)

d. DOT could require the first carrier on departure from the United States to assume liability for the entire journey, to the extent that a passenger's recovery might be limited by the Warsaw Convention (including the jurisdiction limits of the Warsaw

Convention). Recovery under this accident, not liability, policy would be enforced in U.S. Courts, under U.S. law, with the question of a reduction of recovery under the Warsaw Convention a matter of proof. (*See*, Warsaw Art. 30(2))

e. Other similar alternatives could be considered.

We propose to exempt carriers participating in the Agreements, in accordance with the conditions on our approval in this order, from the application of the antitrust laws, in accordance with 49 U.S.C. 41308. We tentatively find that such an exemption is required by the public interest. The Agreements meet a serious transportation need, and provide important public benefits, in that they provide a resolution to the more than forty year effort to provide reasonable liability recoveries for passengers killed or injured in international transportation by air. There are no reasonably available alternatives that are materially less anticompetitive, since these agreements meet the foreign policy and comity objectives of providing reasonable compensation, while at the same time preserving the Warsaw system. In this respect, to the extent that our objectives will be realized by these agreements, as conditioned, denunciation of the Warsaw Convention and the untimely process of seeking new amendments to the Convention, do not provide reasonable alternatives. While there exists a question whether the Agreements would be considered seriously anticompetitive or violative of the antitrust laws, in the absence of an exemption, the threat of antitrust challenge is real, and the applicants represent that the Agreement would not be entered into, at least by a large number of carriers, without the antitrust exemption. Accordingly, we find that grant of such exemption is in the public interest.

In view of the foregoing, we tentatively find that: (1) subject to the conditions in this order, and the contemplated certificate and permit amendments, the IIA, MIA, and IPA agreements are not adverse to the public interest and should be approved; (2) that our approval of the agreements should be made subject to the conditions set forth in this order; (3) that it is in the public interest to adopt the conditions outlined in this order to be attached to all U.S. air carrier certificates, foreign air carrier permits, and all other outstanding, or future, authority to operate in air transportation (including exemption authority); (4) that adherence to these agreements, as conditioned, should be considered to constitute full compliance by the carriers party thereto,

with the Department's regulations and orders requiring adherence to the 1966 intercarrier agreement waiving the Warsaw liability limits up to $75,000 (Agreement 18900), and--in light of the applicability of the IPA Notice provision--to regulations and orders prescribing passenger notice as to limitations of liability; (5) that the Department should retain jurisdiction to attach such further conditions as may from time to time be required by the public interest; (6) that it is in the public interest to grant antitrust immunity, pursuant to 49 U.S.C. 41308(b), to carriers participating in the IIA, MIA and IPA agreements, as proposed to be conditioned by this order; and (7) to the extent not tentatively granted by this order, that the IATA and ATA applications should be denied.

ACCORDINGLY:

1. The International Air Transport Association, the Air Transport Association of America, and all other interested persons are directed to show cause why we should not issue an order making final our tentative findings and conclusions, and, subject to the conditions set forth in this order, approving and granting antitrust immunity with respect to the IIA, MIA and IPA Agreements;

2. The International Air Transport Association, the Air Transport Association of America, all U.S. air carriers holding certificates of public convenience and necessity, all foreign air carriers holding foreign air carrier permits, all other direct carriers holding authority (including exemption authority) to engage in air transportation, and all other interested persons are directed to show cause why the Department should not amend all outstanding (or future issued) certificates, permits or other authority to engage in international air transportation to include the conditions with respect to such authority as outlined in this order;

3. We direct all persons referred to in paragraphs 1 and 2 above, including all interested persons wishing to comment on our tentative findings and conclusions, or objecting to the issuance of the order described in paragraph 1, or amendment of the certificates, permits or other authority as described in paragraph 2, to file in Dockets OST-95-232, and OST-96-1607, and serve on all persons on the service list in those dockets,[19] a statement of such objections or comments,

[19] Because of the short time before these agreements are to be effective (November 1, 1996), service may be made by FAX, and a FAX number should be included on the cover page of all responses.

together with any supporting evidence the objector wishes the Department to notice, not later than October 24, 1996; answers to these submissions will be due October 31, 1996;

4. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived, and proceed to enter a final order, subject to Presidential review under 49 U.S.C. 41307 to the extent required;[20]

5. We grant the motion of the Victims Families' Associations to file their comments late.

6. We will serve this order on The International Air Transport Association, the Air Transport Association of America, all U.S. air carriers holding certificates of public convenience and necessity, all foreign air carriers holding foreign air carrier permits, all other direct carriers holding authority (including exemption authority) to engage in air transportation, all parties to this proceeding, and the Secretary of State, the Attorney General and the Federal Aviation Administration.

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

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[20] Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.